No. 42

IN THE

Supreme Court of the United States

October Term, 1964

MORTIMER SINGER,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICA CURIAE* AND BRIEF

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MOTION FOR LEAVE TO FILE BRIEF *AMICA CURIAE*

Joni Rabinowitz moves for leave to file the annexed brief amica curiae in the above entitled matter. The movant's interest lies in the fact that the same issue, namely, the right to waive a trial by jury, is presented upon her pending appeal in *Rabinowitz* v. *United States of America* (C. A. 5th, No. 21256).

Counsel for amica have examined the briefs filed by the parties in this case in the Court of Appeals for the Ninth Circuit, the petition for certiorari, and memorandum in opposition thereto. Counsel are of the opinion, on the basis of those briefs and petition, that the annexed brief presents to the Court an analysis of relevant authorities which should be decisive of the disposition of this case and which were not presented, or were discussed inadequately, in the

Court below. In the opinion of counsel, the amica brief will make a substantial contribution to a consideration of the issues before the Court.

The Solicitor General has consented to the filing of the attached brief and his letter is on file with the Clerk of the Court. The petitioner, however, whose position the moving party supports, has not responded to several communications from the undersigned counsel requesting leave to submit this brief.

WHEREFORE, it is respectfully prayed that an order be granted granting leave to file this brief on the issue of the right of the defendant to waive a jury trial in a federal criminal proceeding.

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BRIEF FOR *AMICA CURIAE*

Question Presented

This brief is directed to only one of the two issues upon which certiorari was granted in this case, namely, the right of a defendant in a criminal proceeding, pursuant to Article III, Section 2, the Fifth and Sixth Amendments to the Constitution, and Rule 23(a) of the Federal Rules of Criminal Procedure, to waive a trial by jury in a criminal proceeding.

The Interest of the *amica*

The *amica* is a 22-year-old white girl, a student at Antioch College in Yellow Springs, Ohio, and a resident of New Rochelle, New York. On or about April 3, 1963, as part of her work off-campus at Antioch College, she came to Albany, Georgia as a field representative of the Student Non-Violent Coordinating Committee (SNCC) assigned to

work on voter registration. Antioch agreed to credit her project as one that suited the aims of the institution's degree requirements. In July, 1963, Miss Rabinowitz was subpoenaed to appear before a United States grand jury sitting in Macon, Georgia. She appeared before the grand jury on five separate occasions in an inquiry by it concerning the picketing of a grocery store. She stated to the jury that she did not remember seeing the picket line; she thought that if she had seen such picketing, she would have remembered it, and therefore she concluded that she was not in fact present at the time of the picketing. She was thereupon indicted for perjury.

Miss Rabinowitz moved to dismiss the indictment on a number of grounds, including the fact that the grand jury which found the indictment was selected, drawn and summoned in violation of the Fifth Amendment to the Constitution of the United States and Title 8 USC §§ 1861-1865, in that Negroes were intentionally and systematically excluded from serving as jurors solely by reason of their race or color. This motion was supported by extensive testimony in pre-trial proceedings, in which it was established that both the grand and the petit jurors were drawn from a jury list compiled and selected on a racially discriminatory basis similar to that found by the Court of Appeals for the Fifth Circuit for grand and petit juries in the state courts of Georgia. *United States ex rel. Seals* v. *Wiman*, 304 F. 2d 53, 66, 67. The evidence in these hearings established that the juries did not represent a cross-section of the community and that the jury officials failed to apply the proper statutory standards.

Miss Rabinowitz moved also to transfer the trial to a district out of the South on the ground that she could not obtain a fair and impartial trial in the Middle District of Georgia, or elsewhere in the South.

Prior to the trial, Miss Rabinowitz moved to dismiss the venire summoned for the petit jury on the same

grounds as those urged in support of a dismissal of the indictments. That motion was denied.

Finally, Miss Rabinowitz moved to waive her trial by jury. The Government objected, and the motion was denied by the Court. Thereupon, she renewed her motion to transfer the trial which likewise was denied. The case was tried before a jury selected as above indicated and it returned a verdict of guilty. Miss Rabinowitz was adjudged a youth offender pursuant to Title 18 USC § 5010(b). An appeal was taken and is scheduled for oral argument on November 16, 1964 in the Court of Appeals for the Fifth Circuit.

It is in this context that the *amica curiae* presents to this Court the legal arguments on the subject of the right to waive a jury trial.

POINT I

Rule 23(a) of the Federal Rules of Criminal Procedure does not deprive a defendant of the right to waiver of jury trial.

In the light of its history and the constitutional considerations suggested in Point II below, the provisions of Rule 23(a) for Court approval of, and Government consent to a waiver by a defendant of his right to a jury trial should be applied only to insure that the waiver is a truly voluntary one. As this Court said in *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 277:

> "The question in each case is whether the accused was competent to exercise an intelligent informed judgment * * *."

And Judge Holtzoff in the light of his vast experience in the field of criminal law administration has pointed out:

> "While the Rule requires the consent of the Government to a waiver of a jury trial, as far as the

author is aware, the Government has ordinarily considered giving such consent a pro forma routine matter and has generally granted it as of course without discussion. Obviously, the prosecution should be interested only in seeing that justice is done and should have no interest in the choice of the mode of trial * * *

"After all the right to trial by jury is a constitutional right of the defendant alone. It is intended to be a privilege of the accused. The prosecution has no constitutional right to a trial by jury, and the requirement that it give its consent to a waiver is a purely procedural rule and has always been regarded as such." *Holtzoff, A Criminal Case in the Federal Courts*, 1953, Federal Rules of Criminal Procedure, p. 17 (West Publishing Co.)

According to the Advisory Committee's notes, Rule 23(a) embodies the existing practice as illustrated by this Court's decisions in *Patton* v. *United States*, 281 U. S. 276 and *Adams* v. *United States ex rel. McCann, supra*. Prior to those cases, there appears to have been no substantial authority challenging the right of the defendant to waive a trial by jury. There was no Federal rule purporting to limit the right and as this Court said in the *Adams* case, "there is nothing in the Constitution to prevent an accused from choosing to have his fate tried before a judge without a jury * * *" (317 U. S. at 275).

In a leading article on the subject, Dean Griswold has set forth substantial colonial precedent for trials before judges alone where no question appears to have been raised as to the right of the Court or prosecutor to participate in the choice. See *Griswald*, "The Historical Development of Waiver of Jury Trial in Criminal Cases" 20 Virginia Law Review 655 (1933-1934). This Court's decisions in *Patton* and *Adams*, *supra*, did not purport to make any change of substance in that existing practice. In neither case did the Court consider the right of the Government or of the Court itself to participate in the

choice of a trial by judge or by jury. In both cases, the right of the accused to waive was in fact upheld. In both cases, therefore, the language on which the Government relies was dictum.

This is not to say that the *Patton* and *Adams* cases are not most pertinent in their holdings. In the *Patton* case, this Court concluded that a jury trial was not part of the structure of Government, and that it was "a right or privilege of the accused." As it said (281 U. S. at 296):

> "The record of English and colonial jurisprudence antedating the Constitution will be searched in vain for evidence that trial by jury in criminal cases was regarded as a part of the structure of government, as distinguished from a right or privilege of the accused. On the contrary, it uniformly was regarded as a valuable privilege bestowed upon the person accused of crime for the purpose of safeguarding him against the oppressive power of the King and the arbitrary or partial judgment of the court. • • •
>
> "In the light of the foregoing it is reasonable to conclude that the framers of the Constitution simply were intent upon preserving the right of trial by jury primarily for the protection of the accused. • • • "

Indeed, the Court quoted with approval, at p. 295, the dissenting opinion of Judge Aldrich in *Dickinson* v. *United States*, 159 Fed. 801, at 870 (C. C. A. 1, 1908):

> "It is probable that the history and debates of the constitutional convention will not be found to sustain the idea that the constitutional safeguards in question were in any sense established as something necessary to protect the state or the community from the supposed danger that accused parties would waive away the interest which the government has in their liberties, and go to jail.
>
> "There is not now, and never was, any practical danger of that. Such a theory, at least in its application to modern American conditions, is based more

> upon useless fiction than upon reason. And when the idea of giving countenance to the right of waiver, as something necessary to a reasonable protection of the rights and liberties of accused, and as something intended to be practical and useful in the administration of the rights of the parties, has been characterized, as involving innovation 'highly dangerous', it would, as said by Judge Seevers in *State* v. *Kaufman*, 51 Iowa 578, 581, 2 N. W. 275, 277, 33 Am. Rep. 148, 'have been much more convincing and satisfactory if we had been informed why it would be highly dangerous.'"

The *Adams* case involved the right of the defendant who was not represented by counsel to waive a jury trial. Since the consent of the Court and Government had been given, that was not a matter at issue in the case. While the Court repeated in substance the language of *Patton*, it stated:

> "And whether or not there is an intelligent competent, self-protecting waiver of jury trial by an accused must depend upon the unique circumstances of each case." 317 U. S. 269, 278.

This Court further expressed its views on the subject by stating, at p. 276:

> "But procedural devices rooted in experience were written into the Bill of Rights not as abstract rubrics in an elegant code but in order to assure fairness and justice before any person could be deprived of 'life, liberty or property'".

It concluded significantly at pp. 279 and 280 that "what were contrived as protections for the accused should not be turned into fetters", and that we are forbidden to "imprison a man in his privileges and call it the Constitution".

The meaning of Rule 23(a) is further illuminated by the history of the similar provision adopted by the New York State Constitutional Convention of 1938 and embodied in

the Constitution of the State of New York. Article I, sec. 2 provides in part:

> "A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in person in open court before and with the approval of a Judge or Justice of a Court having jurisdiction to try the offense."

In presenting the amendment to the Constitutional Convention, the Chairman of the Committee of the Judiciary, Judge Sears stated:

> "It is intended to protect the rights of the defendant, to assure him by the necessity for an approval by the judge of full opportunity to understand what he is doing. That is all there is in this proposal * * *"

and

> "* * * there should be some restriction on the right to waive so as to assure the defendant an understanding of what he was doing * * *" (Revised Record of the Constitutional Convention of the State of New York, 1938, page 1274.)

There was no suggestion on the floor of the Convention that the purpose of judicial approval went beyond the assurance that the defendant knew what he was doing. No one suggested that other considerations, such as problems of judicial administration, the competency of the court or the nature of the issues involved were to be weighed by the court to determine whether the defendant could exercise his right to trial by judge alone. The only objection was raised by Mr. (now District Judge) Weinfeld, who recommended that the defendant be required to have counsel before he could waive his right to a jury trial. But Judge Weinfeld made it clear that he was seeking to make it impossible "that a man may be deprived of his right to a trial by jury without a full and adequate understanding of just what he is doing," *ibid.*, p. 1286.

The decisions of the New York courts on this problem are thus highly relevant. Not only is the sense of the New York Constitution close to that of Rule 23(a) but all of the three New York members of the Advisory Committee on Criminal Rules, responsible for the drafting of Rule 23(a), had had experience in the New York State Constitutional Convention. Judge Frederick E. Crane and Judge George Z. Medalie were both members of the New York State Constitutional Convention Committee of 1937, Judge Crane being Chairman of its Subcommittee on Judicial Powers and Administration. Professor Herbert Wechsler was a member of the research staff of the Committee and devoted much time to its work. See *New York State Constitution, Annotated,* p. vi and *Problems Relating to Bill of Rights and General Welfare,* p. vi, both published by New York State Constitutional Convention Committee (1938). All three brought to the deliberations of the Advisory Committee their experiences of several years earlier.

More than usual weight must therefore be given to the New York State's interpretation of its Constitution.

The most recent decision in New York is that of *People* v. *Duchin,* 16 App. Div. 2d 438 (2d Dept.) 229 N. Y. S. 2d 46 aff'd 12 N. Y. 2d 351, 239 N. Y. S. 2d 670 (Ct. of App. 1963). The defendant was there charged with rape in a case that had received a great deal of publicity. Feeling that he could not receive a fair trial before a jury, and acting through competent counsel, he sought to waive his right to a jury trial. The prosecutor refused to consent but gave no reasons; the court denied the waiver. The Appellate Division held that the judge had abused his discretion in denying waiver. It said:

> "The constitutional provision conferred on the defendant the right to have trial by a jury, or without a jury, at his option, unless for some compelling reason arising out of the attainment of the ends of justice his option might not be honored. A contrary

> determination would sap the force of the Constitution and render it meaningless save at the uncontrolled will of the court." 16 App. Div. 2d at 485; 299 N. Y. S. 2d at 49.

The case was affirmed on appeal. The Court of Appeals set clear and unmistakable rules for the application of the constitutional provision. Said the court:

> "The [constitutional] provision is designed for the benefit of the defendant. When choosing to be tried by a judge alone, he requests a waiver, he is entitled to it as a matter of right once it appears to the satisfaction of the judge of the court having jurisdiction that, first, the waiver is tendered in good faith and is not a stratagem to procure an otherwise impermissible procedural advantage * * * and, second, that the defendant is fully aware of the consequences of the choice he is making. The requirement that the judge give his 'approval' to the waiver was intended * * * solely 'to assure [the defendant] * * * full opportunity to understand what he is doing'" (12 N. Y. 2d at 352, 239 N. Y. S. 2d at 671).

The court concluded:

> "* * * a defendant may not be forced to trial before a jury if it sufficiently appears that his election to be tried without one was made knowingly and understandingly, based on an intelligent, informed judgment."

It is in the light of this that we note a recent observation on the subject by Judge Weinfeld, one of the most experienced District Court judges in the United States, whose competence in the handling of criminal matters has given him nation-wide recognition. On September 25, 1963, the Judicial Conference of the Second Judicial Circuit of the United States discussed "The Problems of Long Criminal Trials". In the course of that discussion, Judge Weinfeld was asked his views on the right of the accused

in a criminal case to waive a jury without the consent of the court and the Government notwithstanding the rule under discussion. Judge Weinfeld replied:

> "* * * I've given some thought to this very question, because it seems to me that in recent years there have been so many sensational newspaper stories about cases about to be tried that a defendant honestly and sincerely could say that he would prefer the judgment of a single judge and not be tried by a jury of his peers. I don't have to cite instances. You're all aware of many of these cases. I have given some thought to the problem and barring compelling authority—my judgment is that the Rule that we presently have which requires the consent of the prosecution conflicts with a defendant's constitutional right to waive any constitutional right accorded him by the Federal Constitution, and that he does not require the consent of government to give up his right to a trial by jury * * *. So my answer to you is, and my own opinion is, that there is no requirement, constitutionally, that a defendant in order to give up his right to a trial by jury requires the consent of the prosecution—that he has such a right, provided, of course, that it be freely and voluntarily exercised." (34 F. R. D. 205)

POINT II

A construction of Rule 23(a) which would give the Court or the Government the power to force defendant to a trial by jury is unconstitutional.

A construction of Rule 23(a) must be sought which will avoid the substantial constitutional questions which otherwise would be presented by this record. *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 569. Indeed, the construction of Rule 23(a) for which the Government here contends would clearly be in violation of the Constitution.

1, Article III, Sec. 2, of the United States Constitution provides that:

> "[T]he trial of all crimes, except in cases of impeachment, shall be by jury."

The Sixth Amendment provides that in all criminal prosecutions:

> "* * * the accused shall enjoy the right to a speedy and public trial, by an impartial jury."

These provisions were adopted for the benefit of the defendant in a criminal case and not for the benefit of the Government. See *Annals of Congress,* 452, 458, 783-85, 787-89 (Gales ed. 1834); Rutland, *The Birth of the Bill of Rights* 1776-1791 (1955), *passim;* 3 Story, *Commentaries on the Constitution of the United States,* §§ 1773-74 (1833). A "trial by jury was considered solely a defendant's safeguard against arbitrary government prosecution when the Constitution and the Bill of Rights were adopted." *United States ex rel. Toth* v. *Quarles,* 350 U. S. 11, 16. See, also, *Holtzoff, A Criminal Case in the Federal Courts,* 1963, Federal Rules of Criminal Procedure, pp. 17-18 (West Publishing Co.). It is the "right" of the accused, not the Government, which is described in the Sixth Amendment, which also provides that it is the former, not the latter, which is to "enjoy" that right. Indeed, it is difficult to perceive any legitimate interest of the Government in the question as to whether a trial should be held before a judge alone or before a judge and jury. On the one hand, a jury was intended historically to protect the accused against an arbitrary government; on the other hand, particularly in modern times, a jury, more than a judge, is likely to be affected by popular passion and thus unable to give the defendant the fair trial to which he is entitled. But in neither case, can the Government be said to be legitimately interested in the trier of the facts.

Government does have a legitimate interest in being sure that the case is tried before a competent tribunal. But this Court has held that the jury trial provision in Article III, Sec. 2 of the Constitution, is not jurisdictional in the sense that a court without a jury is an incompetent tribunal. This Court has said that Article III, Sec. 2 "was meant to confer a right upon the accused which he may forego at his election"; *Patton* v. *United States,* 281 U. S. 276 at 298. Subsequently, in *Adams* v. *United States ex rel. McCann,* 317 U. S. 269, 275, this Court stated that there is "nothing in the Constitution to prevent an accused from choosing to have his fate tried before a judge without a jury."

While the *Patton* decision does contain rather broad language with respect to the necessity of "the consent of government counsel and the sanction of the court", *supra,* at pp. 312 and 313, this language, as we have argued above at p. 7, is dictum, was not the subject of critical analysis by counsel or the court and has certainly been modified by the language quoted from the *Adams* case. For since the jury trial provisions were inserted to protect the defendant and since the court is competent to try a person accused of crime without a jury, there is, in principle, no reason why a defendant cannot waive a jury trial.

Other constitutional rights designed to protect a defendant may be waived, such as the right to a speedy trial, *Worthington* v. *United States,* 1 F. 2d 154 (C. C. A. 7, 1924); the right to indictment, *Barkman* v. *Sanford,* 162 F. 2d 592 (C. C. A. 5, 1947); the right to be confronted by witnesses, *Diaz* v. *United States,* 223 U. S. 442; *Grove* v. *United States,* 3 F. 2d 965 (C. C. A. 4, 1925); the right to assistance by counsel, *Adams* v. *United States ex rel. McCann,* 317 U. S. 269; *Johnson* v. *Zerbst,* 304 U. S. 458; the right to trial in the state and district of the crime, *United States* v. *Jones,* 162 F. 2d 72 (C. C. A. 2, 1947); the right to a public trial, *United States* v. *Sorrentino,* 175

F. 2d 721 (C. A. 3, 1949); the right to protection against double jeopardy, *Trono* v. *United States*, 199 U. S. 521; and the right to protection against self-incrimination, *Powers* v. *United States*, 223 U. S. 303.

In none of these cases is there any suggestion that the consent of either Government or court is necessary to make the waiver effective, nor was such consent required. There is a correlation between the right to exercise a constitutional right and the right to waive it. So, in the *Adams* case, this Court referred to "the right to assistance of counsel and the correlative right to dispense with a lawyer's help * * *" (317 U. S. at 279). If the right to dispense with a lawyer's help is correlative to the right to assistance of counsel, so the right to waive a jury trial is correlative to the right to have one. Similarly, the Illinois Supreme Court, in holding that a jury trial may be waived, said in *People* v. *Spegal*, 5 Ill. 2d 211, 218 (1955): "The power to waive follows the existence of the right and there is no necessity of guaranteeing the right to waive a jury trial."

Aside from the issues inherent in Article III, Sec. 2 of the Constitution and its Sixth Amendment, there are still other constitutional questions of substance which we encounter if Rule 23(a) is to give the Government or the Court a power to veto a defendant's determination to waive a jury trial. The first of these is that it would give to this Court substantive law-making power in violation of Article I, Sec. I of the Constitution of the United States.

Title 18 U. S. C. § 3771 delegates to the United States Supreme Court the power to prescribe "rules of pleadings, practice and procedure * * * in criminal cases". Obviously the power of the Court can extend only to matters of procedure. Not only does the enabling statute so limit the court's authority in express language, but any other conclusion would violate the fundamental concept of our constitutional system which reserves to Congress the right to pass laws.

In *United States* v. *Sherwood*, 312 U. S. 584, 589, the Court, in considering its analogous power to make rules in civil proceedings, said:

> "An authority conferred upon a court to make rules of procedure for the exercise of its jurisdiction is not an authority to enlarge that jurisdiction and * * * 28 U. S. C. § 723b * * * authorizing this court to prescribe rules of procedure in civil actions gave it no authority to modify, abridge or enlarge the substantive rights of litigants or to enlarge or diminish the jurisdiction of federal courts."

See also, *Mississippi Publishing Corp.* v. *Murphree*, 326 U. S. 438.

It can hardly be said that the question of whether a defendant is to be tried by a judge or jury is a mere procedural matter. The right of jury trial has always been recognized as one of the fundamental bases of our legal system; the right to waive a jury trial is equally fundamental. To hold that Rule 23(a) subjected the defendant's right to a veto by the prosecution certainly turns that Rule into something far more than a rule of procedure.

2. Further, a construction giving the Government such absolute power would deny a defendant due process in a variety of situations, the most obvious of which is presented by the situation involving this *amica curiae*. In the instant case, the Government has made some advance toward this position by stating:

> "Assuming *arguendo* that a denial of a non-jury trial under some circumstances might be so unfair as to present Constitutional questions under the due process clause of the Fifth Amendment * * *". *Singer* v. *United States of America*, Oct. Term 1964 No. 42, Brief for the United States in Opposition, page 6.

It is perfectly obvious that a jury trial can be prejudicial to an accused in a variety of situations, particularly

where the defendant is espousing an unpopular cause. But even where it is not clear that a jury trial might be unfair, it is plain that where the question is a close one, due process is denied if defendant is compelled to try a case to a jury. A jury trial may be a long, drawn out one, which a defendant is unable financially to sustain. A jury is more easily affected notwithstanding the instructions of the trial judge by the failure of the defendant to take the witness stand. A jury, particularly in a conspiracy case, is not always capable of distinguishing among the defendants. This is not an exhaustive list; it is suggested merely to illustrate the dangers that arise when the Government is given a right to choose.

Conclusion

Amica curiae has presented the foregoing argument in the context of her own particular problem in the case now pending in the Court of Appeals for the Fifth Circuit. She has deemed it appropriate in summary fashion to present the problems confronting her in that case for two reasons: First, the arguments presented above sufficiently show the necessity for a construction of the rule proposed by *amica*. Secondly, it is important in any event that a decision by this Court take into consideration, the variety of circumstances in which the problem of jury waiver can arise and that it not preclude by undue breadth of language the assertion of the Constitutional rights that are involved here.

Respectfully submitted,

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